

In The Matter Of:
UNITED STATES OF AMERICA v.
MUSTAFA KAMEL MUSTAFA

May 19, 2014

Southern District Court Reporters

Original File E5jWmusF.txt

Min-U-Script® with Word Index

<p>E5jWmusF Page 3936</p> <p>1 UNITED STATES DISTRICT COURT 2 SOUTHERN DISTRICT OF NEW YORK 3 -----x 4 UNITED STATES OF AMERICA 5 v. 04 CR 356 (KBF) 6 MUSTAFA KAMEL MUSTAFA, 7 Defendant. 8 -----x 9 New York, N.Y. 10 May 19, 2014 11 12:15 p.m. 12 Before: 13 HON. KATHERINE B. FORREST 14 District Judge 15 APPEARANCES 16 PREET BHARARA 17 United States Attorney for the 18 Southern District of New York 19 BY: JOHN P. CRONAN 20 EDWARD Y. KIM 21 IAN P. MCGINLEY 22 Assistant United States Attorneys 23 JEREMY SCHNEIDER 24 JOSHUA DRATEL 25 LINDSAY LEWIS Attorneys for Defendant 26 ALSO PRESENT 27 Vanessa Quinones, Paralegal 28 United States Attorney's Office 29 Mayerlin Ulerio, Paralegal</p>	<p>E5jWmusF Page 3938</p> <p>1 they are in terms of the record, so presumably you folks can 2 work together and gather that. We'll do it with the U.S. 3 Attorney's office being able to electronically print out the 4 pages? 5 MR. CRONAN: Yes, your Honor. 6 MR. SCHNEIDER: I don't think it's a problem as to 7 what it is. I think it would be more of a problem just finding 8 it, actually. That's more difficult. 9 THE COURT: I think the one about Haroon Aswat is 10 relatively straightforward. There are several different places 11 that it appears. I've forgotten the name of the lieutenant 12 colonel who testified, but that fellow had information, 13 obviously. 14 MR. CRONAN: That was Feroz Abbasi. 15 THE COURT: That was Abbasi. All right. You folks 16 will think about it. 17 MR. SCHNEIDER: Your Honor, when you get a chance, 18 could we get a copy of that? It would be easier for us to 19 look. 20 THE COURT: If I take the copy, I'll be taking it away 21 for five minutes. We can do that, but I'll make it available 22 to you folks for sure. 23 Let's circle back to Count Six. What I would like to 24 do and what I suggest we do is come up with hopefully some 25 agreed statements about ways in which circumstantial evidence</p>
<p>E5jWmusF Page 3937</p> <p>1 (Trial resumed) 2 THE COURT: Good afternoon, everyone. 3 I have received two notes from the jury. I'll read 4 them both into the record and then I will make them available 5 for your review after we've talked about them. The first is 6 Court Exhibit 6, and it was received at 12:00. The time 7 indicated was 11:58, and it states, "Reexplain Count Six. 8 Clarity on direct and circumstantial evidence and how it should 9 be weighed as it relates to Count Six. Clarity on inferences 10 as it relates to Count Six. Clarity on," and then it's in 11 quotes, "defendant's action amounting to a substantial step." 12 What is 'substantial'?" And then it states, "What happens if 13 we are unable to agree on a single charge of the indictment," 14 which I take as not meaning no charges but if there is one 15 charge, and I only base that just on the context in which that 16 question appears. 17 The second note, which I have numbered as Court 18 Exhibit 7, was identified as 12:03, it was received at 12:04. 19 This question is: "Any discussion about Haroon in a training 20 camp or safe house, possibly by James Ujaama, one of the U.K. 21 agents, or U.S. officer, and/or Abu Hamza. Was there any 22 mention of where Haroon Aswat arrested or detained, other than 23 the United States?" 24 Those are the questions. I think that the Haroon 25 Aswat questions are relatively straightforward. They are what</p>	<p>E5jWmusF Page 3939</p> <p>1 can but does not have to be weighed for Count Six and the kinds 2 of inferences that are present potentially in one direction 3 and/or another. That's sort of a concrete, I think, 4 assistance, but I also think that what I'd like to do separate 5 from that is go back over with the jury the jury instructions 6 on direct and circumstantial evidence at pages ten and 11 and 7 inferences on pages 12 and 13, and then also it may be that 8 with the referring back to some of the definitions that they 9 could use some clarity on, for instance, where one finds the 10 "provided material support and resources," and that's on page 11 51, and what those terms mean, and an "officially designated 12 terrorist organization," on page 81, what that means, that the 13 defendant acted knowingly. It's an attempt count along with an 14 actual doing count, what that means, and the jurisdictional 15 requirements. 16 Part of my proposal for Count Six is simply going back 17 to the jury instructions. A second part is providing them with 18 more clarity on how the inferences and direct and 19 circumstantial evidence relate to Count Six. 20 MR. SCHNEIDER: Could I just have one moment, please. 21 THE COURT: Yes. Does anybody have any views on Court 22 Exhibit 6, which is the reexplain-Count-Six question? 23 MR. SCHNEIDER: I guess the only thing is, 24 unfortunately, they ask for the words, they want more clarity, 25 so your Honor's going to read it and I don't know if you intend</p>

E5jWmusF	Page 3940	E5jWmusF	Page 3942
1 to, I don't want to use the word ad lib or add something. 2 THE COURT: Let me circle back. What I had suggested 3 was that I do two things. One piece of it was simply pointing 4 out and going back over the jury instructions. 5 MR. SCHNEIDER: Rereading it or just telling them 6 where it is? 7 THE COURT: I'll reread them, those that relate, and 8 the ones that I had suggested were ten to 11, inferences 12 to 9 13. I may not read it word for word, but I may point them to 10 it. And then page 51, and page 81, and then I'll go over the 11 attempt and the jurisdictional requirements, each of the pieces 12 that relate to it. And if you think I've left something out, 13 let me know. 14 MR. DRATEL: I think when the Court said knowingly and 15 intentionally, I think those are terms that should be added as 16 well. The Court mentioned those, and I think that's 17 appropriate. 18 THE COURT: Yes. All right. Separate from that, I 19 think there's a separate component, which is I am saying 20 derived from the word "clarity." They want more. 21 MR. SCHNEIDER: Yes. 22 THE COURT: They want more than just for us to recite 23 the jury instructions back to them. I'll reread the question. 24 It says, "Reexplain Count Six. Clarity on direct and 25 circumstantial evidence and how it should be weighed as it		1 figure out. 2 THE COURT: That's fine. 3 MR. SCHNEIDER: Thank you, your Honor. 4 THE COURT: It will just take a few minutes to do 5 that. I'll be back in ten minutes. 6 (Recess) 7 THE COURT: Let's talk about where we are. Let's 8 start with the note No. 7, Court Exhibit 7. That's the one 9 relating to Haroon Aswat. Have you folks been able to locate 10 any testimony regarding that? 11 MR. CRONAN: We've identified some portions, but we 12 haven't had a chance to confer yet. 13 THE COURT: All right. Have you given your page cites 14 to the folks behind you? 15 MR. CRONAN: Not yet. 16 MR. SCHNEIDER: We're still looking as well, so we 17 haven't been able to exchange any page cites yet. 18 THE COURT: All right. Let's get that done. Why 19 doesn't somebody hand them a piece of paper or something. 20 Let's go on to Count Six. As I have said, I'm going 21 to go through the instructions. It strikes me that it would be 22 useful to set forth the acts which the government contends are 23 encompassed within Count Six, so that the jury has at least a 24 litany of the acts which are contended to be part of that. 25 That may give some clarity, whether they think the acts have	
E5jWmusF	Page 3941	E5jWmusF	Page 3943
1 relates to Count Six." Then it says, "Clarity on inferences as 2 it relates to Count Six," and these are separated by a line. 3 All right? And then separated again by a line, "Clarity on, 4 and they put in quotes "defendant's action amounting to a 5 substantial step.' What is substantial?" 6 That last piece, I'm just looking for a Second Circuit 7 case that's going to define substantial, a case or two, and 8 I'll see what that is and show it to you folks, but that's the 9 way I propose to deal with substantial. It's clarity on 10 circumstantial evidence and weighing it and inferences as it 11 relates to Count Six. 12 Here's what I suggest. Why don't you folks think 13 about this for a few minutes, talk about it with each other so 14 that we don't run into, if we can avoid it, an unalterable 15 problem where I will just give a version that I think. It's 16 worth a shot to see if you folks can agree on what you think is 17 a fair and balanced additional instruction. I'll be in the 18 robing room, and I'll map out what I'm going to do on the jury 19 instructions and then I'll come back out in about ten minutes. 20 MR. SCHNEIDER: Could we just have a copy of the note? 21 THE COURT: I can make a copy. Somebody has to go 22 down to my chambers; I don't have a copy machine up here. So 23 we can do that, but you won't have them for a few minutes, but 24 that's fine. 25 MR. SCHNEIDER: It will just make it easier for us to		1 been proven or not beyond a reasonable doubt, etc., etc., and 2 all the other elements, is a question for them to decide. But 3 providing them with a litany to make sure they're considering 4 the right conduct might be useful. 5 What else have you folks discussed? 6 MR. CRONAN: Your Honor, we haven't discussed this 7 yet, but one case cite I would point the Court to is the 8 Farhane case, on substantial step. 9 THE COURT: I have looked at that, and I can go 10 through the language from that. I have pulled out some 11 language from the Farhane case which dealt with that question 12 directly. In the context of this statute, so it's quite a 13 helpful case. 14 MR. CRONAN: Correct, and I believe it's pin cite 146. 15 THE COURT: My guess is that I'm looking at the same 16 thing. And also 148. It starts on 146, and there is some 17 language, and I'll go through that in a moment. But apart from 18 that, in terms of substance, have you folks talked at all about 19 whether or not you can agree on particular kinds of things to 20 say? 21 MR. DRATEL: No, your Honor. We haven't. 22 THE COURT: Have you talked about it? 23 MR. DRATEL: No, because we're looking at the 24 transcript on the other note. So we didn't do that, obviously. 25 THE COURT: Let me hear from the government what the	

<p>E5jWmusF Page 3944</p> <p>1 acts are from your perspective, Mr. Cronan, that are included 2 in Count Six.</p> <p>3 MR. CRONAN: Your Honor, frankly, I didn't know that 4 was the direction the Court was going to go, so I'm hesitant 5 not to give a full list of acts that would come in under Count 6 Six.</p> <p>7 THE COURT: Let's do this. It sounds like nobody's 8 ready for anything yet. We do need to get them some answers so 9 I'm happy to give them some answers if we get to a point where 10 we're not able to get them together. Let's give you folks 11 another 15 minutes.</p> <p>12 MR. CRONAN: Perfect.</p> <p>13 THE COURT: And then we'll fish or cut bait. Thank 14 you.</p> <p>15 (Recess)</p> <p>16 THE COURT: Why don't we start with the government. 17 Does the government have any proposals as to either of the two 18 notes?</p> <p>19 MR. CRONAN: Your Honor, why don't we start with 20 Exhibit 7, the second note first, if that's okay.</p> <p>21 THE COURT: All right.</p> <p>22 MR. KIM: Your Honor, we have had discussions. I 23 can't say we've reached an agreement. But I guess maybe I'll 24 start by giving you the government's proposed transcript cites. 25 The earliest one is at page 154, lines ten through 15.</p>	<p>E5jWmusF Page 3946</p> <p>1 597 to 600, and the 276 and 277 cites. We don't think they're 2 responsive.</p> <p>3 THE COURT: I haven't looked at those. Can you give 4 me a sense of what you've done and then let me have 5 Mr. Schneider or Mr. Dratel address what the defendant has 6 done.</p> <p>7 MR. KIM: Sure, your Honor.</p> <p>8 THE COURT: In terms of selection.</p> <p>9 MR. KIM: The first citation I gave was with respect 10 to Ms. Morris's testimony at page 154, lines ten to 15, and 11 that is Ms. Morris's testimony regarding what Haroon said about 12 his prior experience, including that he had been training in 13 the camps in Afghanistan. We think that's directly responsive 14 to the jurors' first question, discussion about Haroon in a 15 training camp. And then from Investigator Corey's testimony, 16 at 825, lines 15 through 20, and 900/17 through 901/17 pertain 17 to Investigator Corey's testimony regarding the circumstances 18 of had Haroon's arrest. 825, line 15 to 20 deal with items 19 seized from Haroon Aswat, and then 900, line 17 also deals with 20 items seized from Haroon Aswat and then transitions in at 901 21 to evidence that Haroon Aswat had been in Afghanistan, and that 22 then goes directly to the ledger that had been recovered from 23 an Al Qaeda house in Pakistan.</p> <p>24 THE COURT: All right. Mr. Schneider, do you want to 25 address why you disagree with some of those cites and have</p>
<p>E5jWmusF Page 3945</p> <p>1 THE COURT: And when we get to the point where we've 2 reached a ruling on the cites, you folks will be able to 3 prepare these?</p> <p>4 MR. KIM: Yes, your Honor.</p> <p>5 THE COURT: All right.</p> <p>6 MR. KIM: And that's testimony from Angelica Morris. 7 The second group comes from testimony of Investigator Corey, 8 and that's at 825, lines 15 through 20, and 900, line 17 9 through 901, line 17. And in addition to those transcript 10 cites, we have Government Exhibit 25, Defense Exhibit DD, both 11 of which are stipulations.</p> <p>12 I'll go ahead and just summarize what I think the 13 defense proposals are and Mr. Schneider, of course, will chime 14 in if he has different ones.</p> <p>15 THE COURT: Let me get the cites at page 900 again.</p> <p>16 MR. KIM: Sure. 900, line 17, to 901, line 17.</p> <p>17 THE COURT: 17 to 17. Okay.</p> <p>18 MR. KIM: The defense agrees with a portion of that 19 cite. I think they agree that 901, line three through 901 line 20 17 are responsive. So we have some area of agreement.</p> <p>21 The defendant has also proposed 3306, lines three to 22 seven; 597, line 24 through 600, line 12. They've also 23 proposed 276, line 24, through 277, line one; 277, lines five 24 and six, and 277, lines nine to ten and 13 and 14.</p> <p>25 The government disagrees with the citations at 3306,</p>	<p>E5jWmusF Page 3947</p> <p>1 proposed others?</p> <p>2 MR. SCHNEIDER: Yes. I agree with the Morris cite, 3 the 154, ten through 15, I agree. But we have added the lines 4 from 276 to 277, which you have, and that is because she was 5 specifically asked about whether or not she was ever shown a 6 photograph of Haroon in Afghanistan, whether or not she was 7 ever shown any videotape of Haroon in Afghanistan, or any video 8 of Haroon with Usama bin Laden. So I think those are specific 9 questions about being either in a training camp, because if she 10 was asked on direct, he told you he had been in Afghanistan in 11 the past, that's what 154 talks about, so on cross she was 12 asked if she's ever seen objective evidence to that effect.</p> <p>13 That's what those questions are relevant to. Again, 14 Afghanistan, training camp, or safe house, that's what that's 15 about. So that's with Ms. Morris.</p> <p>16 Regarding Agent Corey, I agree it should be 901, line 17 three to 901, line 17. I do not think 900, line 17 is relevant 18 to the question that the jurors asked. The jurors didn't ask 19 everything about the circumstances surrounding Haroon's arrest 20 or what was recovered from him. They asked specifically about 21 Haroon in a training camp or safe house. Okay? And their 22 pages that I disagree with, 900, line 17, talk about what was 23 recovered from him, and that's really not relevant to the 24 question. Okay? So that's why I disagree with that.</p> <p>25 I also disagree with 825, line 15 to 825, line 20, and</p>

E5jWmusF	Page 3948	E5jWmusF	Page 3950
<p>1 that's because, again, it doesn't address the question. That</p> <p>2 just talks about what was seized from him, and again, that's</p> <p>3 not part of the question. So that's why I disagree with 825</p> <p>4 there.</p> <p>5 Now, regarding 597, line 24, through 600 line 12, and</p> <p>6 597, line 24 to 600, line 12, is Mr. Smith, and I think it's</p> <p>7 relevant to conversations he had with Haroon and what Haroon</p> <p>8 said to him about where he was, who sent him, where he went,</p> <p>9 and then there's also impeachment about that. So that's what's</p> <p>10 all there, 597, line 24 through 600, line 12 talks about</p> <p>11 conversations he, meaning Smith, had with Haroon directly,</p> <p>12 specifically about where he was, where he went, and who sent</p> <p>13 him.</p> <p>14 THE COURT: How about 3306?</p> <p>15 MR. SCHNEIDER: That is the defendant's testimony, and</p> <p>16 3306, lines three through seven, it just seems like --</p> <p>17 "Q. Did you ever send Mr. Kassir or Haroon Aswat to the United</p> <p>18 States to go to the training camp in Bly, Oregon?</p> <p>19 "A. Never, ever thought about training camp or any, once I</p> <p>20 threw it in the rubbish bin, it completely disappeared from my</p> <p>21 mind."</p> <p>22 So I think the question was put to him about Haroon</p> <p>23 and training, the answer is no. The jurors can accept it or</p> <p>24 reject it, whatever they want, but that's the evidence that</p> <p>25 deals with that question. Again, the question is Haroon in a</p>	<p>1 that and see.</p> <p>2 MR. KIM: Sure.</p> <p>3 THE COURT: Otherwise, it does strike me, but I'm</p> <p>4 going to take a look at these, that what the defendant has</p> <p>5 proposed seems appropriate. But let me take a look at these.</p> <p>6 Do you have any particular reason why they don't?</p> <p>7 MR. KIM: Your Honor, David Smith's testimony has</p> <p>8 nothing to do with Haroon Aswat's arrest.</p> <p>9 THE COURT: I don't know. It's not limited to arrest.</p> <p>10 It's two different questions. One is any discussion about</p> <p>11 Haroon in a training camp or safe house and then it goes on, so</p> <p>12 I am not limiting it to just the time of his arrest.</p> <p>13 MR. KIM: If that's the case, your Honor, if the Court</p> <p>14 is inclined to include the defendant's testimony about sending</p> <p>15 Haroon Aswat to Seattle for the jihad training camp, then</p> <p>16 actually we should include the testimony of Angelica Morris and</p> <p>17 Eva Hatley about Haroon's presence in Bly, Oregon, for jihad</p> <p>18 training. Then I think all of that should come in, and</p> <p>19 Ujaama's testimony.</p> <p>20 THE COURT: Why would we exclude that?</p> <p>21 MR. KIM: Your Honor, frankly, we have read this as</p> <p>22 training camps abroad given that it was paired with the safe</p> <p>23 house. That's how we're reading this, your Honor, but if the</p> <p>24 Court is taking a more expansive interpretation --</p> <p>25 THE COURT: I think that to the extent that a training</p>		
E5jWmusF	Page 3949	E5jWmusF	Page 3951
<p>1 training camp, doesn't say where, doesn't say when, or anything</p> <p>2 like that. I think that answer by Mr. Mostafa clearly responds</p> <p>3 to that question. And we don't disagree that the stipulations</p> <p>4 are appropriate, the government stipulation and the defense</p> <p>5 stipulation regarding the ledger was one and the other one</p> <p>6 regarding the fact that Haroon Aswat is in custody in the</p> <p>7 United Kingdom.</p> <p>8 THE COURT: I think those are both appropriate.</p> <p>9 MR. SCHNEIDER: Yes.</p> <p>10 THE COURT: GX25 and DXDD.</p> <p>11 MR. SCHNEIDER: Yes.</p> <p>12 THE COURT: Let me just ask the government why they</p> <p>13 believe that the items found on Mr. Aswat at the time of his</p> <p>14 arrest are responsive to this question, in the government's</p> <p>15 view.</p> <p>16 MR. KIM: Your Honor, I think it relates to the second</p> <p>17 part of the question. They did say was there any mention of</p> <p>18 where Haroon Aswat was arrested or detained other than the</p> <p>19 United States. We think it's responsive to the issue. It's</p> <p>20 basically testimony about his arrest. Obviously the items</p> <p>21 don't specifically say where, but we think it's responsive to</p> <p>22 the general question.</p> <p>23 THE COURT: All right. I'll take a look. It needs to</p> <p>24 be tied to a "where" in order to be responsive, and was there</p> <p>25 any mention of where he was arrested, but I'll take a look at</p>	<p>1 camp is read to include the Smith testimony, then I think that</p> <p>2 it fairly includes a training camp, which could include what</p> <p>3 you've just suggested.</p> <p>4 Mr. Schneider, do you have a reaction to that one way</p> <p>5 or the other?</p> <p>6 MR. SCHNEIDER: My reaction is I think the</p> <p>7 government's going to try to put before you the fact that the</p> <p>8 defendant supposedly sent him somewhere. That's not what</p> <p>9 they're asking. They're asking how he got there or why he got</p> <p>10 there.</p> <p>11 THE COURT: It says any discussion.</p> <p>12 MR. SCHNEIDER: Discussion about him being in a</p> <p>13 training camp, about his presence in a training camp is how I</p> <p>14 perceive this note to be. They want to know if there's any</p> <p>15 evidence that he was ever seen or mentioned about being in a</p> <p>16 training camp or ever seen or anybody mentions any conversation</p> <p>17 about him being in a safe house, I think.</p> <p>18 THE COURT: Here's what I suggest, because you folks</p> <p>19 are not going to agree on this and it's going to either</p> <p>20 dramatically expand or not expand the testimony. What I</p> <p>21 suggest is I ask them whether they're looking for U.S. and</p> <p>22 outside of the U.S. or are they looking for both or only for</p> <p>23 something overseas and then have them answer that.</p> <p>24 MR. SCHNEIDER: That's fine.</p> <p>25 THE COURT: And then based upon that geographical</p>		

<p>E5jWmusF Page 3952</p> <p>1 determination, that tells us where we should go. 2 MR. SCHNEIDER: That's fine. 3 THE COURT: Can the government go and start getting 4 the other pages prepared -- the part that you folks agree on, 5 GX25 and DXDD, they've got in the room -- 154, lines ten to 15 6 and then I guess I've got to look at it? 7 MR. MCGINLEY: Those have been cut already, but we 8 just need to print it out. 9 THE COURT: Let's go on to the next. 10 MR. KIM: Your Honor, on the clarification, I think we 11 should just say Bly as opposed to in the United States, just so 12 we don't add any additional confusion, if they start wondering 13 if there's testimony they haven't remembered about somewhere 14 else in the United States. 15 THE COURT: That's fine. Mr. Schneider. 16 MR. SCHNEIDER: That's fine. 17 THE COURT: I'll ask them about Court Exhibit 7 and 18 then I'll tell them we're preparing some other testimony from 19 them, and then how much we prepare for them will depend on the 20 answer to that question. 21 Let's go on to Court Exhibit 6. Do people have 22 suggestions as to Court Exhibit 6? 23 MR. CRONAN: Your Honor, with respect to the issue of 24 marshaling the government's evidence that we believe goes to 25 Count Six, our concern is that we don't want to create an</p>	<p>E5jWmusF Page 3954</p> <p>1 THE COURT: Let me just be clear about what I was 2 suggesting, which is it needs to be the four or five things, 3 whatever the number is, that constitute knowingly providing 4 material resources and support, by the defendant. 5 MR. CRONAN: Correct. 6 THE COURT: And/or aiding and abetting and/or 7 attempting and/or the other alternative bases of liability. So 8 testimony regarding Al Qaeda is not going to do it, right? 9 MR. CRONAN: It depends what they're going at. If 10 they're going to material support for Al Qaeda in particular, 11 we think that would be part of the inference that they would be 12 able to draw. 13 THE COURT: That's towards Al Qaeda, the organization. 14 If that's where you're going, I'm going to hold off because 15 what you're suggesting is putting together all of the evidence 16 as to each of the elements. That's not what I'm interested in. 17 What I'm thinking they might want to do is simply have a list 18 of, We should consider, and then frankly, I think it would be 19 useful for them to have a list of, they can consider the 20 sending of Aswat and Kassir to Bly as one of the acts of 21 sending personnel. Right? Sending whatever else, I've 22 forgotten what the specific time frames are. That's obviously 23 the most obvious one. 24 MR. CRONAN: I think that's right, your Honor. In 25 terms of however this question is responded to, I think it's</p>
<p>E5jWmusF Page 3953</p> <p>1 exhaustive list here. 2 THE COURT: I wouldn't marshal the evidence. What I'm 3 looking for was just the very high level, we're alleging that 4 X, Y, and Z is part of what Count Six is directed towards. 5 MR. CRONAN: Your Honor, I've come up with a list of 6 stuff. I think we need to be careful that it's not viewed as 7 an exhaustive list but more, for example, here's some of the 8 conduct the government has pointed to. Even doing it at a high 9 level, I think there is quite a bit that we would need to list 10 if we're going to go down that route as opposed to just giving 11 the instruction on circumstantial evidence and inferences and 12 seeing if they request additional clarity. But if the Court 13 wants, I could. 14 THE COURT: Tell me what you've got so I can see how 15 far afield I think you are or how much vehemency defense 16 counsel may or may not have towards your position. 17 MR. CRONAN: Right. 18 Kassir and Aswat arrived in Seattle in the fall of 19 1999 and traveled to Bly; the October 1999 fax to Abu Hamza 20 discussing that Abu Hamza will be sending two brothers, 21 describing the property in Bly as resembling Afghanistan and 22 discussing easing the burdens off the backs of the brothers 23 abroad; testimony that Al Qaeda and the Taliban were fighting 24 together in Afghanistan at the time; Kassir and Aswat arriving 25 in Seattle.</p>	<p>E5jWmusF Page 3955</p> <p>1 important that the material support definition be reiterated 2 given some arguments during closing that suggested that just 3 providing personnel may not be enough, that there would 4 actually have to be training, which is not consistent with the 5 law. 6 May we just have a moment here. 7 THE COURT: I'll hold off. What I'm going to do for 8 right now is have them in. Let me read you folks what I'm 9 going to do on substantial step so you folks have an idea 10 because we've talked about how I'm just going to go through the 11 elements otherwise from the charge, and I don't plan to vary 12 things, although let me just state that I'm going to cover page 13 42. I'm going to again reference that it includes aiding and 14 abetting or Pinkerton liability or attempting the same as well 15 as directly doing the same; the time period; what it means to 16 provide material support or resources, that's from page 51. 17 I'm going to reiterate that there's no 956 conspiracy. I'll 18 define knowingly at page 56. I'll define aiding and abetting 19 at pages 71 to 73. I'll define an officially designated 20 terrorist organization at page 81; jurisdiction at page 88; and 21 then in terms of substantial step, attempt on page 90, I'll 22 take them through that and then substantial step, and I've 23 taken this from the Farhane case. 24 I would say, You folks have asked about the 25 definition, more information on defendant's action amounting to</p>

<p>E5jWmusF Page 3956</p> <p>1 a substantial step, what is substantial. And I would say the 2 identification of substantial step is necessarily a matter of 3 degree. Actions need to manifest a firm disposition to commit 4 the crime being attempted. For attempted provision of material 5 resources or support, the defendant must have taken a 6 substantial step -- that is, more than a minor or insignificant 7 step -- to provide material support or resources. A 8 substantial step towards the provision of material support need 9 not be planned to culminate in actual terrorist harm but only 10 in support, even benign support, for an organization committed 11 to such harm. A substantial step can be the defendant or it 12 can be another person. It can include providing personnel to 13 work for Al Qaeda. Another word about substantial step. You 14 have to ask yourself: Was there a step taken? Was the step 15 more than minor? And was the step an important step, or was it 16 unimportant?</p> <p>17 And except for my steps at the end, the rest of it is 18 basically direct quotes or close to quotes from Farhane. 19 Any comment?</p> <p>20 MR. CRONAN: Your Honor, unfortunately, we don't have 21 the full decision in front of us, just a summary that was sent 22 to us. One phrase that stood out is "a substantial step can 23 include providing personnel to work for Al Qaeda." I think it 24 should be to support Al Qaeda rather than necessarily work for 25 Al Qaeda.</p>	<p>E5jWmusF Page 3958</p> <p>1 defined by what it is, as opposed to what it isn't, so I don't 2 think there's a necessity for mentioning the 956 conspiracy not 3 being here or there, just what is in Count Six is important, as 4 opposed to what is not there.</p> <p>5 THE COURT: I am going to mention 956, and I'll just 6 tell you why. 956 is in some but not in others and I wanted to 7 be clear about what it is in the original jury instruction. It 8 was pulled out that 956 is not part of Count Six.</p> <p>9 MR. DRATEL: With respect to substantial step, I think 10 there are a couple of pieces of language there that don't apply 11 to this case and perhaps would sow more confusion than resolve 12 it for the jury. One is benign support. The government's not 13 alleging benign support. In the Tabir case, provision of 14 medical services was arguably benign support. Here, it's not 15 benign so I don't know that that gives the jury any better 16 guidance. I think that that one little clause should come out 17 certainly. And certainly the Court has taken language directly 18 from the case. However, I think there's also other language 19 there that's important. One, and this is from page, also 147, 20 that's conduct planned to culminate in the commission of the 21 substantive crime.</p> <p>22 THE COURT: Let me just get to where you are. Page 23 147?</p> <p>24 MR. DRATEL: Yes.</p> <p>25 THE COURT: Where is it? Under the second point?</p>
<p>E5jWmusF Page 3957</p> <p>1 THE COURT: It says, We conclude that the evidence was 2 sufficient to support Tabir's conviction for attempting to 3 provide material support in the form of personnel, specifically 4 himself, to work for." Now, they were finding a sufficiency in 5 their case of "to work for," and so I picked it out of that.</p> <p>6 What was your proposed language?</p> <p>7 MR. CRONAN: Your Honor, if I remember Farhane right, 8 I believe that was someone who provided medical services for Al 9 Qaeda.</p> <p>10 THE COURT: It is.</p> <p>11 MR. CRONAN: In that context, it seems like "worked 12 for" kind of fits better in terms of that proof. Here, we 13 would say to support Al Qaeda, personnel to support Al Qaeda.</p> <p>14 THE COURT: All right. Does defense counsel have any 15 comments?</p> <p>16 MR. DRATEL: Yes, your Honor. First, I think, I don't 17 know why the Court would do aiding and abetting if they didn't 18 ask for that, or about Pinkerton. I think it should be limited 19 to attempt. That's what they asked about.</p> <p>20 THE COURT: No. They say reexplain Count Six. That's 21 the first dash. I intend to fully reexplain it, and I'll give 22 them just the explanation I would give them if I were just 23 going to recite it.</p> <p>24 MR. DRATEL: With respect to substantial step, and 25 also, about not being a 956, I think Count Six should be</p>	<p>E5jWmusF Page 3959</p> <p>1 MR. DRATEL: I have to bring it up, your Honor. I'm 2 sorry. I took some notes, but I'll get back to the decision, 3 which I only have electronically here. So let me just get it 4 up here. It's 147, and there's a citation to the Isaac case, 5 so I know that's where it is.</p> <p>6 THE COURT: I see it. It's just before (2).</p> <p>7 MR. DRATEL: Right.</p> <p>8 I think that is important as well. And obviously 9 comparisons between cases to a certain extent is apples and 10 oranges, but I think there should be some reference that this 11 is a case-by-case determination for the jury to make because 12 there is no bright line, as the Court says elsewhere. I think 13 right after that, the Court says there's no bright line. Right 14 before the matter of degree, I think it says no bright line, 15 and varies depending upon the particular facts of the case, and 16 this comes all from page 147.</p> <p>17 THE COURT: Since they don't know about any other 18 cases or fact patterns and they don't know that this is coming 19 out of the Farhane case, I don't think it's necessary to 20 reference case by case. Necessarily, their consideration is in 21 the context of only this case.</p> <p>22 MR. DRATEL: Then I think the Court should take out 23 the part about personnel, because that has to do with Farhane 24 specifically. It's a very direct reference to the fact pattern 25 in that case, and here I think it's too much targeting for</p>

E5jWmusF	Page 3960	E5jWmusF	Page 3962
1 something that has to do with this case to some extent, but in 2 Farhane, they're reaching a conclusion, and that's why it's in 3 there. Here, I think it directs a conclusion to the jury that 4 goes further than the Court has to in that regard, further than 5 the Court ought to in that regard. 6 THE COURT: Does the government have a view on that? 7 MR. CRONAN: Your Honor, with respect to the benign 8 language and the personnel, we think both of them should be 9 included. The jury asked for clarification as to what a 10 substantial step means, in this context. Farhane addressed 11 that with respect to benign. The circuit in Farhane said a 12 substantial step in a material support case is different than 13 other types of crimes for certain reasons, including that any 14 type of support, benign support, is enough. Benign should be 15 in there. It explains what is required in this specific case. 16 And with respect to personnel, that certainly should be in 17 there. Personnel is how the defendant is accused of providing 18 material support in this case. It's directly responsive and a 19 completely accurate statement of the law. 20 THE COURT: All right. 21 MR. DRATEL: There's that statement in Farhane about 22 what is required for a substantial step for 2339(b) as opposed 23 to, let's say, robbery or a drug crime, and the Court included 24 that in what it intends, and that adequately, accurately, 25 sufficiently gives the jury the guidance it needs as to what is		1 And it says I'm to do neither. Maybe what I'll say is I'm not 2 going to encourage you or discourage you, there are various 3 procedures involved. I'll do it very lightly. My point is I'm 4 not going to suggest to them that they go back right now and 5 write down a partial verdict, nor am I going to prevent them if 6 they want to give one at some point. They're entitled to. 7 MR. CRONAN: We think very lightly would be the way to 8 go here. It also may be worth just explaining to them how 9 we're interpreting this question, your Honor. I think our view 10 is the same as yours, that they're asking what if we agree on a 11 bunch of counts but not one or two counts, but there is a 12 little bit of ambiguity in how this question is phrased, so 13 maybe we should just explain how we're reading this question. 14 THE COURT: All right. What I'll say is there's a 15 difference between one or none and so if you folks at some 16 point have a partial verdict but not a whole verdict, we can 17 talk about that. If you feel you're unable to arrive at any 18 verdict, we can talk about that; you need to be specific at the 19 time. All right? 20 We're going to bring the jury out in a second, but 21 this is on a side note. We had a discussion last week about 22 defense theories, and various people indicated that there was 23 no such thing as sort of a defense charge, and I want to give 24 you folks some cite. Really, this is for the future. I did 25 give the defense charge that was requested, and I'm very glad I	
E5jWmusF	Page 3961	E5jWmusF	Page 3963
1 a substantial step in the context of this statute. And that 2 language is the language about it doesn't have to be a 3 substantial step towards terrorist acts in themselves, but 4 merely substantial step towards providing support for the 5 terrorist organization. That, I think, covers it, and anything 6 else gets too close to the conclusion that was reached in 7 Farhane on an entirely different set of facts. 8 THE COURT: All right. I hear the positions. 9 On partial verdict, as you folks are aware, the Court 10 is not to encourage nor discourage a partial verdict. My view 11 at this point in time, given that it's been less than two full 12 days in deliberations is to simply just say I saw that note, we 13 can certainly talk about with you folks delivering a partial 14 verdict on some but not all counts. You wouldn't be able to 15 change your verdict as to any counts where you delivered a 16 verdict, but why don't you folks take that back and think about 17 it; in other words, not do anything at this point one way or 18 the other that does anything to take a verdict now. 19 MR. CRONAN: Your Honor, given how early we are in 20 deliberations, I think we'd be inclined not to include the 21 first phrase that could be read as an invitation that they 22 could return a partial verdict and just emphasize that they 23 should keep on deliberating. 24 THE COURT: The problem is that the Second Circuit law 25 is really quite clear that I can't encourage or discourage.		1 did. U.S. V. Dove, Second Circuit, 916 F.2d 41; U.S. v. 2 Vasquez, 82 F.3d 574; U.S. v. Crowley, 263 F.3d 104, and then 3 there are others. There is a long-standing body of law about 4 it being reversible error not to give a defense charge when 5 requested, unless it's so far afield that any basis at all for 6 requested defense charge entitles the defendant to a defense 7 charge. 8 All right. Let's go ahead and bring out the jury and 9 we'll start with some of this stuff, and then I'll go through 10 the testimony after we've done the first part. 11 (In open court; jury present) 12 THE COURT: I've received two notes from the jury, and 13 we have been busily discussing these and taking some time to 14 think about things and discuss them in a couple different 15 sessions, so we've been busy. I apologize for the delay. We 16 received a note that we've marked as Court Exhibit 6 at noon. 17 This note says, "Reexplain Count Six. Clarity on direct and 18 circumstantial evidence and how it should be weighed as it 19 relates to Count Six." Then "clarity on inferences as it 20 relates to Count Six. Clarity on 'defendant's action amounting 21 to a substantial step.' What is substantial?" And then, "What 22 happens if we are unable to agree on a single charge of the 23 indictment?" 24 Then there's Court Exhibit No. 7, a second note that 25 was received a couple minutes later, 12:04. This note asks,	

E5jWmusF	Page 3964	E5jWmusF	Page 3966
<p>1 "Any discussion about Haroon in a training camp or safe house, 2 possibly by James Ujaama, one of the U.K. agents or U.S. 3 officer or Abu Hamza." And then, "Was there any mention of 4 where Haroon Aswat arrested or detained other than the United 5 States?"</p> <p>6 Let me take the second, Court Exhibit 7, first. It 7 would be helpful for us if we knew whether you were looking for 8 discussion about Haroon in a training camp in the United 9 States, Bly, or outside of the United States. All right? If 10 it's both, then it's both. But if it's one or the other, that 11 would be helpful to know and we can isolate that pretty 12 quickly. So you folks can go in there and make sure you're all 13 on the same page and then just send out a quick note and we'll 14 get that testimony gathered up. But it makes a difference in 15 what we gather, obviously.</p> <p>16 In terms of Court Exhibit 6, which is to reexplain 17 Count Six, six and six, here's what I'm going to do. I'm going 18 to talk you through a couple of these things to make sure we're 19 all on the same page about what this Count Six has to do with.</p> <p>20 First, you guys may want to have your jury 21 instructions with you. You know what? I don't think I saw any 22 of you folks come out with your jury instructions. What I'd 23 ask you to do is have you folks go back into the jury room, 24 those of who want to grab your jury instructions can. If 25 people don't feel it's necessary, you don't have to grab them,</p>		<p>1 page 51 defines that in the context of other charges, but these 2 are the definitions to be included here. You'll see it says to 3 provide material support or resources means making available 4 material support or resources.</p> <p>5 The term "material support or resources" is defined by 6 the statute to include, and each one of these is separate, 7 training, weapons, lethal substances, explosives, or personnel. 8 And it doesn't include medicine or religious materials. The 9 words "weapons, lethal substances, and explosives" have their 10 ordinary meaning. The word "training" means instruction or 11 teaching designed to impart a specific skill as opposed to 12 general knowledge. The word "personnel" refers to one or more 13 people jointly engaged in a common undertaking. The word 14 "personnel" includes the defendant himself or also includes 15 other people.</p> <p>16 Now, if you want to read the entirety of these 17 instructions as I'm going through them, you should feel free 18 to. I'm just going to point you to certain things, but you 19 can, of course, go back and read the entirety of these pages.</p> <p>20 As you recall with Count Six, there is no 956 21 conspiracy. You go to page 56 for the definition of knowingly. 22 Knowingly -- here, it talks about knowledge in the middle of 23 the page -- is a matter of inference from facts proven. A 24 person acts knowingly if he acts deliberately, not because of 25 mistake, accident, mere negligence, or other innocent reason.</p>	
E5jWmusF	Page 3965	E5jWmusF	Page 3967
<p>1 but it might be helpful if you want to, as I walk through them, 2 somebody may want to flag things. Whoever wants to go get 3 their jury instructions, why don't you go get them and then 4 we'll wait for you right here and then you'll gather together 5 and come on back out.</p> <p>6 (Jury temporarily excused)</p> <p>7 THE COURT: I'm sure you folks are familiar with this 8 because your question is pretty specific, so I apologize for 9 going over a few things that you may feel that you don't need 10 me to go over, but just for safe ensuring that we've all got 11 clarity, the first thing is to, again, have you look at page 12 42. That gives you a sense of where it falls, and then that 13 shows you that the count, if you turn to the actual count, 14 which starts on page 84, you see it there, says that Counts Six 15 and Ten charge the defendant with actually providing material 16 support or resources to Al Qaeda or aiding and abetting others 17 to provide material support or resources to Al Qaeda. And 18 Count Six relates to specifically the time period of October 19 1999 up to and including in or about 2000. And because of your 20 questions, it sounds like you've focused on the next part, 21 which is that Count Six also charges the defendant with 22 attempting to provide material support to Al Qaeda, so the 23 question then becomes what is providing material support or 24 resources to Al Qaeda.</p> <p>25 If you turn back to page 51 and you look at page 51,</p>		<p>1 I'm going to do the word "intentionally" also. That 2 comes up in the attempt charge. An act is done intentionally 3 if it is done purposefully and voluntarily and not because of 4 mistake, accident, negligence, or other innocent reason; that 5 is, the acts must be the product of the defendant's conscious 6 objective.</p> <p>7 In terms of Count Six, and then I'm going to go back 8 to circumstantial evidence and inferences in a moment, as you 9 recall a moment ago, Count Six also has an aiding and abetting 10 theory of liability, and that's on pages 71 to 73. Right? So 11 if those elements for aiding and abetting liability are met, 12 that's a possible theory, but you'd have to find that the 13 elements are met. If you find that they are not met, then you 14 could not find any liability using this theory.</p> <p>15 Similarly, if you turn to page 74, there's another 16 method for all of the substantive charges, which is Pinkerton 17 liability, and the Pinkerton elements are set forth on pages 74 18 and 75 and up to 76. So I just remind you of that.</p> <p>19 Then there's a piece of Count Six, which is that the 20 material support or resources have to be to an officially 21 designated terrorist organization, and that's on page 81, 22 foreign terrorist organization, and you'll see there it says 23 that the parties have stipulated that the secretary of state 24 has designated Al Qaeda as a foreign terrorist organization and 25 that it was so designated on October 8, 1999.</p>	

<p>E5jWmusF Page 3968</p> <p>1 Then you'll also recall that for Count Six there is a 2 jurisdictional element, and that's on page 88. That's where it 3 says that some portion of the conduct constituting the offense 4 occurred within the United States or the defendant was subject 5 to the jurisdiction of the United States. It goes on. A 6 defendant is subject to the jurisdiction of the United States 7 if the defendant aids and abets or conspires either with a 8 United States citizen or with a person who is providing them 9 material support or resources to a terrorist organization from 10 within the United States. The government need not prove both, 11 but in order to convict the defendant, you must be unanimous 12 that the government has proven beyond a reasonable doubt at 13 least one of these two jurisdictional elements. And then it 14 states at the bottom, again, the defendant need not himself 15 have set foot in the United States for this jurisdictional 16 element to be satisfied.</p> <p>17 Let's go on to attempt. Page 90 is where you find the 18 attempt charge. And Count Six charges attempt or the direct 19 commission. Right? It's the one charge that has an attempt 20 charge, and that's laid out here at pages 90 to 91. One of the 21 elements of attempt is the substantial step requirement that 22 you folks have asked about, so let me go on to clarity on 23 defendant's action amounting to a substantial step, what is 24 substantial.</p> <p>25 There's no bright line. It's up to you folks as the</p>	<p>E5jWmusF Page 3970</p> <p>1 substantial step is conduct planned to culminate in the 2 commission of the substantive crime. A substantial step can be 3 the defendant or another providing personnel, even himself, to 4 support Al Qaeda.</p> <p>5 Now, another word about substantial step. You have to 6 ask yourself was there a step taken. Right? Was the step more 7 than minor? Was the step important, or was it unimportant? 8 And those are questions for you to ask yourself.</p> <p>9 You folks also asked what happens if we are unable to 10 agree on a single charge of the indictment. It was unclear 11 whether that meant you can agree on everything but a single 12 charge or you couldn't agree on anything at all. So it was 13 either sort of, were you talking about unable to agree on one 14 charge or -- one charge. I see somebody holding up their 15 finger one.</p> <p>16 There are procedures for dealing with such a thing. 17 If at some point in time you folks want us to explain those 18 procedures for you, we can explain those procedures for you. 19 It sounds from your questions that maybe there is additional 20 thinking that will go on based on these answers to the 21 questions, and also based on the testimony that we'll give you, 22 as soon as you folks send us a note about whether you wanted 23 the Haroon training camp to be domestic or ex U.S., what you're 24 thinking of in that regard, or both. But there are procedures 25 if we need to get there. All right? So does this help you</p>
<p>E5jWmusF Page 3969</p> <p>1 jury, ladies and gentlemen, to determine what you think is a 2 substantial step. There's no bright line. The identification 3 of substantial step is necessarily a matter of degree. Actions 4 need to manifest a firm disposition to commit the crime being 5 attempted. For attempted provision of material resources or 6 support, the defendant must have taken a substantial step -- 7 that is, more than a minor or insignificant step -- to provide 8 material support or resources to the terrorist organization. A 9 substantial step towards the provision of material support need 10 not be planned to culminate in actual terrorist harm, but only 11 in support, even benign support, for an organization committed 12 to such harm.</p> <p>13 Want me to do that again?</p> <p>14 JUROR: Yes.</p> <p>15 THE COURT: I see some folks who, I think, would like 16 it again. Again, there's no bright line. The identification 17 of substantial support is necessarily a matter of degree. 18 Actions need to manifest a firm disposition to commit the crime 19 being attempted. For attempted provision of material resources 20 or support, the defendant must have taken a substantial step -- 21 that is, more than a minor or insignificant step -- to provide 22 material support or resources. A substantial step towards the 23 provision of material support need not be planned to culminate 24 in actual terrorist harm itself, but only in support, even 25 benign support, for an organization committed to such harm. A</p>	<p>E5jWmusF Page 3971</p> <p>1 folks?</p> <p>2 JUROR: Can we answer you? Can we answer?</p> <p>3 THE COURT: I sort of am looking for facial 4 expressions. Here's what I would ask you to do. Go back and 5 write a paragraph if you want to ask a question. Make sure you 6 all agree on it. We read these things word for word and we're 7 trying to figure out every word that you say, do you mean this, 8 do you mean that. If you were thinking we still haven't 9 answered the question, go back and write down something else 10 and we'll keep working it until we get the question right. The 11 reason I don't have you say it out loud is because some of you 12 might phrase it one way and some might phrase it another way, 13 and suddenly we've got a whole bunch of people asking all the 14 questions at once. But let us know if we're not getting to the 15 question that you would like. All right? And we'll get you 16 the testimony as soon as you folks send back out a note on the 17 Haroon issue. All right? Thanks.</p> <p>18 (Recess pending verdict)</p> <p>19 THE COURT: Is there something else? I'm going to go 20 look at the testimony.</p> <p>21 MR. CRONAN: Two suggestions. With respect to the 22 additional language that was taken from Farhane, it may be 23 helpful for them to have a written copy of that instruction as 24 well in the jury room, since they have a copy of all the other 25 jury instructions as well.</p>

<p>E5jWmusF Page 3972</p> <p>1 The other thing is maybe it wasn't the Court's 2 intention to, but I don't believe the Court referred them to 3 the instructions on direct and circumstantial evidence, ten 4 through 13. 5 THE COURT: You're right. When they write their next 6 question, we'll have them out and I'll go through that again 7 with them. If we go through another round, you can feel free 8 to jump up. I know that I don't encourage the jumping up, but 9 that's one place, for efficiency's sake, to prevent me from 10 making too big a blunder. 11 MR. KIM: If the Court is going to be looking back at 12 the cites we gave, I misspoke on the stipulation. It's 13 Government Exhibit 4, not Government Exhibit 25. 14 THE COURT: Thank you. And I take it, Mr. Schneider, 15 what you were agreeing to was the correct stipulation, so is 16 four okay? 17 MR. SCHNEIDER: Yes. 18 THE COURT: Looks like we have a note. "Ex U.S." I 19 have a note from the jury that will be marked as Court Exhibit 20 8, received today at 2:09. 21 Here's what I'm going to suggest we do, which is I 22 write a note and have the marshal bring in the note saying, Do 23 they want the Court to give them additional instruction on 24 circumstantial evidence and inferences and see if they want to 25 come back out for that. Or do people want me to have them back</p>	<p>E5jWmusF Page 3974</p> <p>1 had not been sent for jihad training but instead was sent, was 2 in Seattle. That deals with sent to jihad training elsewhere, 3 so I think that's relevant. And I think he was then impeached 4 with a prior inconsistent statement about that later. But your 5 Honor can see the pages in front of you. It's only one page 6 we're talking about. 7 THE COURT: Let me go take a look at these. I'll make 8 rulings on these individually and send back out a piece of 9 paper that will have the rulings on them. 10 (Recess) 11 THE COURT: I have received a note from the jury at 12 2:38. I've marked it Court Exhibit 8. It states, "We have 13 reached a verdict." 14 MR. SCHNEIDER: Actually, your Honor, it's Court 15 Exhibit 9. 16 THE COURT: Court Exhibit 9. All right. Let's bring 17 out the jury. 18 (In open court; jury present) 19 THE COURT: Ladies and gentlemen, I have received a 20 note, which states, "We have reached a verdict." It's been 21 marked as Court Exhibit 9 and is signed by the foreman. 22 Mr. Foreman, would you please hand the verdict sheet 23 to my deputy, sir. 24 Would you please read the verdict form. 25 THE DEPUTY CLERK: The jury's verdict in the matter of</p>
<p>E5jWmusF Page 3973</p> <p>1 out for that right now? 2 MR. SCHNEIDER: I think the note is fine. 3 MR. CRONAN: Your Honor, either that or we could give 4 them the page cites in the jury charge as well. I believe it 5 was ten through 13. 6 THE COURT: Here is the note: "Does the jury want the 7 Court to discuss direct and circumstantial evidence and 8 inferences any more (see pages ten through 13 of your 9 instructions)." 10 Acceptable? 11 MR. SCHNEIDER: Yes. 12 MR. CRONAN: Yes, your Honor. 13 THE COURT: All right. In light of the fact that the 14 Haroon testimony is ex U.S., does it modify some of the 15 instructions? 16 MR. SCHNEIDER: I don't think it modifies ours. I 17 think it may modify the government's. 18 THE COURT: I thought that one of yours was the Smith 19 one was a Bly instruction. Is that not right? 20 MR. KIM: Your Honor, I think the defense cites, Smith 21 and the defendant's testimony related to Bly. The ones that we 22 propose all relate to outside the United States. 23 MR. SCHNEIDER: Your Honor, I think the Smith portion 24 of 597, line 24, all deals with the fact that he, meaning 25 Haroon, specifically told Smith that he was frustrated that he</p>	<p>E5jWmusF Page 3975</p> <p>1 United States of America v. Mostafa Kamel Mostafa, 04 CR 356: 2 With respect to Count One, how do you find the 3 defendant? Guilty. 4 With respect to Count Two, how do you find the 5 defendant? Guilty. 6 With respect to Count Three, how do you find the 7 defendant? Guilty. 8 With respect to Count Four, how do you find the 9 defendant? Guilty. 10 With respect to Count Five, how do you find the 11 defendant? Guilty. 12 With respect to Count Six, how do you find the 13 defendant? Guilty. 14 With respect to Count Seven, how do you find the 15 defendant? Guilty. 16 With respect to Count Eight, how do you find the 17 defendant? Guilty. 18 With respect to Count Nine, how do you find the 19 defendant? Guilty. 20 With respect to Count Ten, how do you find the 21 defendant? Guilty. 22 With respect to Count Eleven, how do you find the 23 defendant? Guilty. 24 Foreperson, is this the jury's verdict? 25 THE FOREPERSON: Yes.</p>

E5jWmusF	Page 3976	E5jWmusF	Page 3978
<p>1 THE COURT: Please poll the jury.</p> <p>2 THE DEPUTY CLERK: Juror No. 1, is this your verdict?</p> <p>3 JUROR NO. 1: Yes.</p> <p>4 THE DEPUTY CLERK: Juror No. 2, is this your verdict?</p> <p>5 JUROR NO. 2: Yes.</p> <p>6 THE DEPUTY CLERK: Juror No. 3, is this your verdict?</p> <p>7 JUROR NO. 3: Yes.</p> <p>8 THE DEPUTY CLERK: Juror No. 4, is this your verdict?</p> <p>9 JUROR NO. 4: Yes.</p> <p>10 THE DEPUTY CLERK: Juror No. 5, is this your verdict?</p> <p>11 JUROR NO. 5: Yes.</p> <p>12 THE DEPUTY CLERK: Juror No. 6, is this your verdict?</p> <p>13 JUROR NO. 6: Yes.</p> <p>14 THE DEPUTY CLERK: Juror No. 7, is this your verdict?</p> <p>15 JUROR NO. 7: Yes.</p> <p>16 THE DEPUTY CLERK: Juror No. 8, is this your verdict?</p> <p>17 JUROR NO. 8: Yes.</p> <p>18 THE DEPUTY CLERK: Juror No. 9, is this your verdict?</p> <p>19 JUROR NO. 9: Yes.</p> <p>20 THE DEPUTY CLERK: Juror No. 10, is this your verdict?</p> <p>21 JUROR NO. 10: Yes.</p> <p>22 THE DEPUTY CLERK: Juror No. 11, is this your verdict?</p> <p>23 JUROR NO. 11: Yes.</p> <p>24 THE DEPUTY CLERK: Juror No. 12, is this your verdict?</p> <p>25 JUROR NO. 12: Yes.</p>		<p>1 other fellow jurors is if you speak to speak about you and your</p> <p>2 process, not about anybody else's. Let other people speak for</p> <p>3 themselves, if they choose to do so, or respect their desire to</p> <p>4 be silent, if they choose to do so.</p> <p>5 Thank you again and Joe will give you some final</p> <p>6 paperwork and instructions to process you, but you've completed</p> <p>7 your jury service for some time. Thank you. You are</p> <p>8 discharged.</p> <p>9 (Jury discharged)</p> <p>10 THE COURT: The verdict form will be marked as Court</p> <p>11 Exhibit 10. It is here for your inspection if you would like.</p> <p>12 All of the court exhibits will be posted on the docket.</p> <p>13 We have a couple of matters to take up. First, are</p> <p>14 there any applications?</p> <p>15 MR. CRONAN: Not from the government, other than</p> <p>16 continued detention, your Honor.</p> <p>17 MR. DRATEL: No, your Honor.</p> <p>18 THE COURT: Nothing from the defendant.</p> <p>19 MR. SCHNEIDER: No.</p> <p>20 THE COURT: What we should do is set a sentencing</p> <p>21 date. My suggestion is that we set that out, typically it's</p> <p>22 been taking about 90 days, about three months, to get a</p> <p>23 sentencing. What I would suggest is that we set a date. I'm</p> <p>24 hesitating because there's got to be an interview by probation</p> <p>25 with the defendant within two weeks. There are some new rules;</p>	
E5jWmusF	Page 3977	E5jWmusF	Page 3979
<p>1 THE DEPUTY CLERK: The jury is polled, your Honor.</p> <p>2 THE COURT: Counsel, at this time, is there any reason</p> <p>3 not to discharge the jury?</p> <p>4 MR. CRONAN: Not from the government, your Honor.</p> <p>5 MR. SCHNEIDER: No, your Honor.</p> <p>6 THE COURT: Ladies and gentlemen, I want to thank you</p> <p>7 for doing your jury service. I want to thank you for being</p> <p>8 here for the better part of six weeks, for having paid close</p> <p>9 attention to this long and complicated case. Thank you. Our</p> <p>10 system of law depends upon folks such as you doing your jury</p> <p>11 service, and seeing you folks come in here every day and being</p> <p>12 on time and doing your job is really a wonderful statement of</p> <p>13 our jury system working. Thank you.</p> <p>14 At the beginning of this trial, I had you folks take</p> <p>15 the oath of silence, which you have been very good about living</p> <p>16 with throughout this trial. I'm going to release you now from</p> <p>17 that oath. You may talk to others about this case if you so</p> <p>18 desire, but you need not. If you choose to talk, that is your</p> <p>19 choice alone. If you choose not to talk, that is your choice.</p> <p>20 It's entirely up to you. If someone calls you and you don't</p> <p>21 want to talk, you simply say I'm not interested in talking.</p> <p>22 That is your right and you may do that, so do not worry about</p> <p>23 that. Don't worry about hurting anybody's feelings. It's your</p> <p>24 choice to make, whether you choose to speak or not speak.</p> <p>25 The one thing that I ask you as a courtesy to your</p>		<p>1 I'm not sure if you folks are all aware of them. But I don't</p> <p>2 know if people have plans after this long trial to go away and</p> <p>3 whether or not two weeks is a realistic time frame for defense</p> <p>4 counsel, or that's fine.</p> <p>5 MR. DRATEL: Even the 90 days may not be realistic,</p> <p>6 your Honor, so I don't know that two weeks, I'm familiar with</p> <p>7 the rules that have been promulgated in terms of the standard,</p> <p>8 but for a defendant whose family is in the U.K., whose whole</p> <p>9 life is in the U.K., I think it's going to be more than 90 days</p> <p>10 even for the probation department. I don't know how long it</p> <p>11 takes, but it's not a normal situation for us or probation, so</p> <p>12 I think that setting it out further than 90 days and more than</p> <p>13 two weeks for the interview is consistent with what's going to</p> <p>14 be necessary.</p> <p>15 THE COURT: We can do four months. I have a number of</p> <p>16 defendants who are not U.S. citizens. It can take longer,</p> <p>17 depending upon how much information is located overseas, but I</p> <p>18 doubt there will be any trips by probation overseas. It's more</p> <p>19 likely that they would confer by phone. But four months is</p> <p>20 perfectly acceptable to the Court. Why don't we set a date</p> <p>21 four months out. We are currently on May 19. Why don't we set</p> <p>22 it right after Labor Day.</p> <p>23 MR. SCHNEIDER: That's fine. Any day of the week of</p> <p>24 September 8, which is a Monday?</p> <p>25 THE COURT: That's fine.</p>	

E5jWmusF Page 3980

1 MR. SCHNEIDER: Mr. Dratel and I are actually
2 scheduled to start a trial on September 15 before Judge
3 Engelmayer, two separate defendants. We don't know if it's
4 going to happen or not, but I think the week of the eighth
5 makes sense.

6 THE COURT: Let's shoot for the week of September 8.
7 Or let's do September 8 at 1:00. All right?

8 MR. SCHNEIDER: Okay.

9 THE COURT: I'll leave it to you folks to make
10 arrangements to at least make the appointment with probation,
11 if you could, within 14 days, even if the time frame is a
12 little bit longer. Then we'll have complied with their 14-day
13 requirement. The government is to get a summary of the
14 case to probation within a similar time frame.

15 MR. CRONAN: Your Honor, I'm terribly sorry for
16 asking, but I actually have a hearing in D.C. on Monday, the
17 eighth. Is there any flexibility that week? If not, I will
18 try to work it out.

19 THE COURT: I can do it on the ninth at one p.m. The
20 government will get its summary to probation.

21 MR. CRONAN: We will.

22 THE COURT: Do we need to set a schedule for any
23 posttrial motions?

24 MR. DRATEL: Yes. 30 days.

25 THE COURT: Do you want to confer with the government

E5jWmusF Page 3981

1 and get me a schedule?

2 MR. DRATEL: Your Honor, I think we may have to set a
3 schedule within the seven-day period. What we will do is talk
4 to the government and get the Court a proposed schedule within
5 that period so that it can be acted on within that time period.

6 THE COURT: Why don't you folks confer and then just
7 give me something maybe by the end of the week or within the
8 time period allotted under the rules for the motions and the we
9 will give you an adjournment.

10 Anything further?

11 MR. CRONAN: No, your Honor.

12 MR. DRATEL: There is one thing, your Honor. I
13 understand with respect to the presentence report how it might
14 have an impact, but once that interview is finished, could
15 Mr. Mostafa be transferred to a medical facility?

16 THE COURT: Why don't you make that as part of your
17 application or make an application in writing about that. Tell
18 me when it's been done and make a transfer request. I think
19 you can do that internally through the MCC. I don't think I
20 even have to be involved unless there's an issue with it. Once
21 the trial is done, I think it's really up to the BOP.

22 MR. DRATEL: Thank you, your Honor.

23 THE COURT: Thank you. Anything further?
24 We are adjourned.

25 o0o